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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CALVIN WARR, Defendant and Appellant.	C068699 (Super. Ct. No. 09F04180)

Defendant Calvin Warr, member of the Ridezilla street gang, got into a heated verbal exchange with rival gang member Diantae Hogan. Hogan's friend, Gerald Kendrix, was present during the argument and was in the line of fire when defendant pulled a semi-automatic handgun and fired a single shot, striking both Hogan and Kendrix. Defendant then threatened another of Hogan's friends before leaving the scene. The jury convicted defendant of attempted murder, attempted voluntary manslaughter, and making a criminal threat. The jury also found that defendant personally used and discharged a firearm and that he committed the crimes for the benefit of a criminal street gang. Defendant

was sentenced to state prison for an indeterminate term of 25 years to life plus a consecutive determinate term of 24 years, 8 months. The trial court also ordered defendant to pay a number of fines and fees, including booking and classification fees.

On appeal, defendant asserts (1) his attempted voluntary manslaughter conviction must be reversed because there is no evidence Kendrix either provoked the shooting or caused defendant to unreasonably believe in the need for self-defense; (2) the jury was incorrectly instructed on attempted voluntary manslaughter; and (3) the booking and classification fees must be stricken because there is no evidence of the actual administrative costs of booking and classification or of defendant's ability to pay these fees.

In *People v. Smith* (2005) 37 Cal.4th 733 (*Smith*), our Supreme Court held that a defendant who purposefully discharges a firearm at two people, both of whom are directly in his line of fire, may be convicted of two counts of attempted murder because the jury may reasonably infer that he intended to kill both people. (*Id.* at p. 743; see also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 691; *People v. Leon* (2010) 181 Cal.App.4th 452, 466.) But what if, as in this case, the jury convicts the defendant of attempted murder with respect to the primary victim and attempted voluntary manslaughter with respect to the secondary victim, even though there is no evidence the secondary victim either provoked the shooting or caused the defendant to unreasonably believe in the need for self-defense? In other words, where there is sufficient evidence to affirm two

attempted murder convictions, but the jury mitigated one of the crimes to attempted voluntary manslaughter based on no evidence that such mitigation was warranted, must we reverse the attempted voluntary manslaughter conviction for insufficient evidence? In this case, as we explain in the discussion that follows, the answer is "no."

We also conclude that the jury was properly instructed on attempted voluntary manslaughter and that any error worked to defendant's benefit rather than his detriment. Defendant's claim that the booking and classification fees are not supported by substantial evidence has been forfeited. Accordingly, we affirm the judgment.

FACTS

During the early morning hours of December 16, 2008, Hogan, Kendrix, and My'esha Lomack drove to a duplex at the corner of 40th Street and 41st Avenue in south Sacramento. Dynisha Buford, the mother of Hogan's daughter, was staying at the duplex. She had previously called Hogan and asked him to come over to pick up their daughter. Kendrix drove. Hogan was in the front passenger seat. Lomack was in the back seat. When they arrived, Hogan went up to the duplex and Lomack moved to the front passenger seat.

At the front door, Hogan got into an argument with Buford's sister, Teresa. Defendant, who was dating Teresa, was also at the duplex. He joined in the argument and told Hogan: "[Y]ou're fucking up my game" and "you need to leave." Hogan responded with: "[W]here's my fucking daughter[?] I don't give

a fuck about what is going on. Where the fuck is Dynisha[?]" Kendrix heard that his friend was in an argument, opened the driver's side door, and watched the scene unfold over the roof of the car.

At this point, three or four other men came out of the duplex. Defendant and Hogan continued to argue. Hogan told defendant that he was "from the Starz," a street gang from south Sacramento. He then walked back to the car and challenged defendant to fight him in the street. Defendant, a member of the 29th Street Crip and Ridezilla street gangs, followed Hogan into the street. Defendant and Hogan pushed each other several times in front of the car. Defendant then pulled a semi-automatic handgun from his waistband, chambered a round, and fired a single shot. The bullet hit Hogan in the neck, shattering the sixth cervical vertebrae, and passing completely through the neck. The bullet then hit Kendrix at the base of the neck, collapsing the left lung, and lodging near the spine.

When the shot was fired, Lomack was trying to get out of the car to grab Hogan and pull him away from the confrontation. Hogan fell to the ground in front of the car. Kendrix fell into the car, which was still running, and hit the gas pedal with his foot. The car surged forward and struck Hogan, trapping him beneath the driver's side tire. Both Kendrix and Lomack fell out of the car.

Defendant then walked over to Lomack, pointed the gun at her chest, and said: "[B]itch, you want to die, too[?]" The other men who were at the duplex got into a car that was parked

in the driveway. One of these men called to defendant: "Ridezilla, come on." Defendant got into the car and left the scene. Police and paramedics arrived a short time later. Hogan and Kendrix survived their injuries.

At the time the shot was fired, a distance of about six to eight feet separated defendant from Hogan. A distance of about 10 feet separated Hogan from Kendrix. Both Hogan and Kendrix were in defendant's line of fire when he pulled the trigger.

DISCUSSION

I

Sufficiency of the Evidence

Defendant asserts that his attempted voluntary manslaughter conviction must be reversed because there is no evidence Kendrix either provoked the shooting or caused defendant to unreasonably believe in the need for self-defense. He is mistaken.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] [A] reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] 'This standard applies whether direct or circumstantial evidence is involved.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

The mental state required for attempted murder differs from that required for murder. Murder requires malice, express or implied. Express malice, i.e., intent to kill, requires a showing that the defendant either desired the death of the victim, or knew to a substantial degree of certainty that death would occur. (*Smith*, *supra*, 37 Cal.4th at p. 739.) Implied malice simply requires a showing that the defendant consciously disregarded human life. (*People v. Lasko* (2000) 23 Cal.4th 101, 107.) Attempted murder requires express malice; a conscious disregard for life will not suffice to support a conviction for attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 327-328.) However, "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*People v. Stone* (2009) 46 Cal.4th 131, 140.) For example, a person who "indiscriminately fires a single shot at a group of persons with specific intent to kill *someone*, but without targeting any particular individual or individuals, . . . is guilty of a single count of attempted murder." (*People v. Perez* (2010) 50 Cal.4th 222, 225; *People v. Stone*, *supra*, 46 Cal.4th at p. 141.)

Another difference between murder and attempted murder involves the doctrine of transferred intent. "Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder -- due to transferred intent -- if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The

defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*People v. Bland*, *supra*, 28 Cal.4th at p. 328; *People v. Perez*, *supra*, 50 Cal.4th at p. 230; *People v. Stone*, *supra*, 46 Cal.4th at p. 141 ["guilt of attempted murder must be judged separately as to each alleged victim"].)

At the same time, as mentioned, someone who purposefully discharges a firearm at two people, both of whom are directly in his or her line of fire, may be convicted of two counts of attempted murder because the jury may reasonably infer that he or she intended to kill both people. (*Smith*, *supra*, 37 Cal.4th at p. 743.) In *Smith*, the defendant was convicted of two counts of attempted murder based on a single shot fired into the back of a slowly moving vehicle driven by his ex-girlfriend Karen. The defendant was aware that Karen's infant son was seated in a car seat directly behind her. The bullet narrowly missed both Karen and her son. (*Id.* at pp. 742-743.) Upholding both convictions, our Supreme Court explained that "in order for the jury to convict defendant of the attempted murder of the baby, it had to find, beyond a reasonable doubt, that he acted with intent to kill that victim," and that "evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both." (*Id.* at p. 743; see also

People v. Chinchilla, *supra*, 52 Cal.App.4th at p. 691 ["[w]here a defendant fires [a single shot] at two officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both"].)

Here, defendant fired a single shot at Hogan and Kendrix. There can be no doubt that both men were in defendant's line of fire since both were hit by the bullet. From this, the jury could reasonably infer that defendant harbored the concurrent intent to kill both men. Thus, two attempted murder convictions would be supported by substantial evidence. However, the jury did not convict defendant of two counts of attempted murder. Defendant was convicted of attempted murder with respect to Hogan and attempted voluntary manslaughter with respect to Kendrix. The question is whether we must reverse the attempted voluntary manslaughter conviction because there is no evidence that Kendrix either provoked the shooting or caused defendant to unreasonably believe in the need for self-defense.

"'Manslaughter, an unlawful killing without malice, is a lesser included offense of murder.' [Citations.] 'Although [Penal Code] section 192, subdivision (a), refers to "sudden quarrel or heat of passion," the factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation.' [Citations.] 'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the

victim.' [Citation.] '[T]he victim must taunt the defendant or otherwise initiate the provocation.' [Citations.] The '"heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . ."' [Citation.]" (*People v. Avila*, *supra*, 46 Cal.4th at p. 705; *People v. Verdugo* (2010) 50 Cal.4th 263, 293.)

Another form of voluntary manslaughter involves the doctrine of imperfect self-defense. The factor that distinguishes this form of voluntary manslaughter from murder is the existence of "'[a]n honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury'"; such a mental state "'negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter.' [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 883; *In re Christian S.* (1994) 7 Cal.4th 768, 773; *People v. Barton* (1995) 12 Cal.4th 186, 200.)

Voluntary manslaughter, like murder, does not require an intent to kill. For example, "a killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill. Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill." (*People v. Lasko*, *supra*,

23 Cal.4th at pp. 107-110, fns. omitted.) At the same time, attempted voluntary manslaughter, like attempted murder, does require an intent to kill. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550.) Thus, both attempted voluntary manslaughter and attempted murder require that (1) the defendant took at least one direct but ineffective step toward killing a person, and (2) the defendant intended to kill when he or she acted. However, the same circumstances that mitigate murder to voluntary manslaughter also mitigate attempted murder to attempted voluntary manslaughter, i.e., (A) adequate provocation, and (B) an honest but unreasonable belief in the need for self-defense.

In this case, defendant asserts there is no evidence that Kendrix either provoked the shooting or caused him to unreasonably believe in the need for self-defense. While true, defendant can hardly be heard to complain that the jury, after finding that he pulled the trigger with the intent to kill Kendrix, i.e., attempted to murder him, *mitigated* the crime to attempted voluntary manslaughter based on no evidence that such mitigation was warranted. In other words, "the evidence as a whole was sufficient to support a verdict of [attempted] murder. Under the accepted rule announced in section 1159 of the Penal Code the conviction of the lesser offense of [attempted voluntary] manslaughter was proper and is fully supported by the

evidence." (*People v. Campanella* (1941) 46 Cal.App.2d 697, 702; Pen. Code, § 1159.)[1]

Our conclusion is also bolstered by the settled rule that "an inherently inconsistent verdict is allowed to stand; if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both. [Citations.] When a jury renders inconsistent verdicts, 'it is unclear whose ox has been gored.' [Citation.] The jury may have been convinced of guilt but arrived at an inconsistent acquittal or not true finding 'through mistake, compromise, or lenity . . . .' [Citation.] Because the defendant is given the benefit of the acquital, 'it is neither irrational nor illogical to require her [or him] to accept the burden of conviction on the counts on which the jury convicted.' [Citation.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.)

Here, the jury found that Hogan's actions the morning of the shooting did not amount to adequate provocation or cause defendant to unreasonably believe in the need for self-defense. And since Kendrix did nothing but stand next to the car, we may reasonably presume that the jury mitigated the attempted murder

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[1] Penal Code section 1159 provides: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

of Kendrix to attempted voluntary manslaughter based on mistake, compromise, or lenity. Having received the benefit of this mitigation, defendant cannot -- and does not -- complain that he was inconsistently convicted of attempted murder with respect to Hogan. In these circumstances, we do not believe that he should be able to challenge the attempted voluntary manslaughter conviction as unsupported by substantial evidence.

Finally, defendant argues that "[t]he attempted voluntary manslaughter conviction cannot be upheld on the claim that Kendrix was within a 'kill zone.'" The "kill zone" theory of concurrent intent applies to the situation in which the defendant, with the intent to kill a specific target, employs a means of attack designed to kill everyone in the vicinity of the target in order to ensure the death of the target. In such a situation, the defendant creates a "kill zone" around the target, and the jury may reasonably infer that defendant possesses the concurrent intent to kill everyone within the kill zone. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 326-327, 329-330.) "'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting

of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.'" (*Id.* at pp. 329-331, quoting with approval *Ford v. State* (1993) 625 A.2d 984, 1000-1001; see also *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.)

We agree that this case does not involve a "kill zone" of the type described above. Nevertheless, defendant did fire a single shot at two people who were directly in his line of fire. This supports an inference that defendant harbored the concurrent intent to kill both people. (See *Smith*, *supra*, 37 Cal.4th at p. 743; see also *People v. Chinchilla*, *supra*, 52 Cal.App.4th at p. 691.) Both attempted murder and attempted voluntary manslaughter require defendant to have possessed the intent to kill. (*People v. Montes*, *supra*, 112 Cal.App.4th at pp. 1549-1550.) The jury so found. As we have explained, "the evidence as a whole was sufficient to support a verdict of [attempted] murder. Under the accepted rule announced in section 1159 of the Penal Code, the conviction of the lesser offense of [attempted voluntary] manslaughter was proper and is fully supported by the evidence." (*People v. Campanella*, *supra*, 46 Cal.App.2d at p. 702.)

II

Instructional Error

Defendant also claims the jury was incorrectly instructed on attempted voluntary manslaughter. Specifically, he argues that CALCRIM No. 603, defining attempted voluntary manslaughter based on heat of passion, should have informed the jury that the alleged victim must have been the one who provoked the defendant to act rashly and without due deliberation in attempting to kill that victim. Similarly, he argues that CALCRIM No. 604, defining attempted voluntary manslaughter based on imperfect self-defense, should have informed the jury that the alleged victim must have been the one who placed the defendant in fear of imminent danger of being killed or suffering great bodily injury.

Defendant did not object to these instructions at trial. "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) We find no error, much less a miscarriage of justice.

CALCRIM No. 603, as given to the jury in this case, provided: "[An attempted] killing that would otherwise be attempted murder [is] reduced to attempted voluntary manslaughter, if the defendant attempts to kill someone because of a sudden quarrel or in the heat of passion. [¶] The defendant

attempted to kill someone because of a sudden quarrel or in the heat of passion if: [¶] One, the defendant took at least one direct but ineffective step toward killing a person, [¶] Two, the defendant intended to kill that person, [¶] Three, the defendant attempted the killing because he was provoked, [¶] Four, the provocation would have caused an ordinary person of average disposition to act rashly and without due deliberations, that is, from passion rather than from judgment; and [¶] Five, the attempted killing was a rash act done under the influence of intense emotions that obscured the defendant's reasoning or judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberations and reflection. [¶] In order for a sudden quarrel or heat of passion to reduce an attempted murder to attempted voluntarily [*sic*] manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. [¶] While no [specific] type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. [¶] You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts. [¶] If

enough time passed between the provocation and the attempted killing for an ordinary person of average disposition to [']cool off[’] and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and was not acting as a result of a sudden quarrel or in the heat of passion. [¶] If the People have not met this burden, you must find the defendant not guilty of attempted murder."

CALCRIM No. 604, as given to the jury in this case, provided: "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter: [¶] If the defendant [attempted to kill] a person because he acts in imperfect self-defense. If you conclude the defendant acted in complete self-defense, his action was lawful, and you must find him not guilty of any crime. [¶] The difference between complete self-defense and imperfect self-defense [depends] on whether the defendant's belief in the need to use deadly for[ce] was reason[able]: [¶] The defendant acted in imperfect self-defense if one, the defendant took at least one direct but ineffective step towards killing a person, [¶] Two, the defendant intended to kill when he acted, [¶] Three, the defendant believed that he was in imminent danger of being killed or suffering great bodily injury, [¶] And four, the defendant believed that the immediate use of any force was necessary to defend against the danger, [¶] But five, at least

one of the defendant's belief[s] was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] The defendant must have actually believed [there] was imminent danger of [violence] to himself. [¶] In weighing the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. [¶] If the People have not met this burden, you must find the defendant not guilty of attempted murder."

These instructions accurately describe the law. And no reasonable jury would have understood these instructions to allow the attempted murder of Kendrix to be mitigated to attempted voluntary manslaughter regardless of whether Kendrix provoked defendant or caused an honest but unreasonable belief in the need for self-defense. But more importantly, any mistaken belief the jury might have had in this respect worked to defendant's benefit, not his detriment. Thus, there was no conceivable prejudice.

III

Booking and Classification Fees

Finally, by failing to object to the trial court's imposition of booking and classification fees, defendant has forfeited the ability to challenge the sufficiency of the evidence to support these fees on appeal.

"In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims,

reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim." (*People v. Scott* (1994) 9 Cal.4th 331, 351; *People v. Walker* (1991) 54 Cal.3d 1013, 1023 ["'purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had'"]; see also *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 [stating that the correct legal term for loss of right based on failure to assert it in a timely fashion is forfeiture, not waiver].) This forfeiture doctrine applies to claims of sentencing error asserted by both the People and the defendant. (*People v. Tillman* (2000) 22 Cal.4th 300, 303.) "Thus, all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review." (*People v. Smith* (2001) 24 Cal.4th 849, 852, quoting *People v. Scott*, *supra*, 9 Cal.4th at p. 352.)

However, there is a "narrow exception" to this forfeiture rule for sentences that are unauthorized or entered in excess of jurisdiction. "Because these sentences 'could not lawfully be imposed under any circumstances in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.]" (*People v. Smith*, *supra*, 24 Cal.4th at p. 852.) Our Supreme Court has "deemed appellate intervention appropriate in these cases because the errors presented 'pure

questions of law' [citation], and were 'clear and correctable' independent of any factual issues presented by the record at sentencing.' [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not [forfeited]." (*Ibid.*)

In *People v. Gibson* (1994) 27 Cal.App.4th 1466, we held that a defendant's failure to object to a restitution fine forfeits the claim that the trial court failed to consider his ability to pay the fine. (*Id.* at p. 1467-1468.) As we explained: "As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal. [Citations.]" (*Id.* at p. 1468.) We also explained that, "because the appropriateness of a restitution fine is fact-specific, as a matter of fairness to the People, a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay the fine. Otherwise, the People would be deprived of the opportunity to cure the defect by presenting additional information to the trial court to support a finding that defendant has the ability to pay. [Citations.] A challenge to

the sufficiency of the evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial." (*Id.* at pp. 1468-1469.)

We further explained that "the need for orderly and efficient administration of the law -- i.e., considerations of judicial economy -- demand that defendant's failure to object in the trial court to imposition of the restitution fine should preclude him from contesting the fine on appeal. [Citations.] Defendants routinely challenge on appeal restitution fines to which they made no objection in the sentencing court. In virtually every case, the probation report put the defendant on notice that a restitution fine would be imposed. Requiring the defendant to object to the fine in the sentencing court if he or she believes it is invalid places no undue burden on the defendant and ensures that the sentencing court will have an opportunity to correct any mistake that might exist, thereby obviating the need for an appeal. Conversely, allowing the defendant to belatedly challenge a restitution fine in the absence of an objection in the sentencing court results in the undue consumption of scarce judicial resources and an unjustifiable expenditure of taxpayer monies. It requires, in almost all cases, the appointment of counsel for the defendant at taxpayers' expense and the expenditure of time and resources by the Attorney General to respond to alleged errors which could

have been corrected in the trial court had the objection been made." (*People v. Gibson*, *supra*, 27 Cal.App.4th at p. 1469; see *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [defendant forfeited claim that trial court failed to consider his ability to pay crime prevention fine and record did not support such an ability]; see also *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1070-1072, 1076 [defendant forfeited claim that, while probation report recommended a $250 probation fee, neither probation officer nor trial court expressly found an ability to pay].)

In this case, the probation report recommended, and the trial court imposed, a jail booking fee of $263.85 and a jail classification fee of $28.75. While the trial court did not find that defendant possessed an ability to pay these fees, defendant did not object to their imposition, and has therefore forfeited the claim that there is insufficient evidence to support his ability to pay. Nor can he complain that there is no evidence that the amount imposed was the actual administrative cost of booking and classification. This too is a fact-specific matter that should have been brought to the trial court's attention. (See *People v. Gibson*, *supra*, 27 Cal.App.4th at pp. 1468-1469; contra *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [claim of insufficient evidence to support imposition of fee may be raised for first time on appeal].)

Finally, this conclusion is not contrary to *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), in which our Supreme

Court held that the forfeiture doctrine did not apply to a defendant's claim that the trial court improperly ordered him to submit to an HIV test because there was insufficient evidence in the record to support a finding of probable cause to believe that blood, semen, or other bodily fluid capable of transmitting HIV was transferred from defendant to the victim. (*Id.* at pp. 1125-1126.) The court explained: "'Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception.' [Citation.] This principle of appellate review is not limited to judgments, and we conclude it should apply to a finding of probable cause pursuant to [Penal Code] section 1202.1, subdivision (e)(6). Just as a defendant could appeal an HIV testing order, without prior objection, on the ground he had not been convicted of an enumerated offense [citations], he should be able to do so on the ground the record does not establish the other prerequisite, probable cause. We perceive no basis for distinguishing the two statutory predicates." (*Id.* at p. 1126.) The court continued: "The fact that a testing order is in part based on factual findings does not undermine this conclusion. Probable cause is an objective legal standard -- in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim. [Citations.]" (*Id.* at p. 1127.) Thus, "because the terms of

the statute condition imposition [of an HIV testing order] on the existence of probable cause, the appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record. . . . Indeed, even in the case of an express finding of probable cause, the question -- being one of law rather than fact -- would be considered de novo on appeal. [Citation.]" (*Ibid.*)

However, the *Butler* court was also careful to point out: "Our conclusion in this case is controlled not only by the specific terms of [Penal Code] section 1202.1 but also by the general mandate that involuntary HIV testing is strictly limited by statute. For this reason, nothing in our analysis should be construed to undermine the forfeiture rule of *People v. Scott*, *supra*, 9 Cal.4th 331, that absent timely objection sentencing determinations are not reviewable on appeal, subject to the narrow exception articulated in [*People v. Smith*, *supra*, 24 Cal.4th 849]." (*Butler*, *supra*, 31 Cal.4th at p. 1128, fn. 5.) And as Justice Baxter wrote in his concurring opinion, in order to "make explicit" what was "implicit" in the above-quoted footnote: "Thus, despite our ruling today, it remains the case that *other* sentencing determinations may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by substantial evidence. This includes claims that the record fails to demonstrate the defendant's ability to pay a fine." (*Id.* at p. 1130 (conc. opn. of Baxter, J.), citing *People v. Gibson*, *supra*, 27 Cal.App.4th

at pp. 1468-1469 and *People v. Valtakis*, *supra*, 105 Cal.App.4th at p. 1072.)

We conclude defendant's claim that the booking and classification fees are not supported by substantial evidence has been forfeited.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

HULL, Acting P. J.

MAURO, J.